

BEFORE THE SHORELINES HEARINGS BOARD AND
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

FRIENDS OF THE EARTH,)
)
Appellant,)
)
v.)
)
PACIFIC COUNTY; WILLAPA NWR;)
PACIFIC COUNTY WEED BOARD;)
DEPT. OF NATURAL RESOURCES;)
and DEPT. OF FISH & WILDLIFE,)
)
Respondents,)
)
THE NATURE CONSERVANCY,)
)
Petitioner for)
Intervention.)

SHB NO. 94-33

SETTLEMENT AGREEMENT
AND STIPULATED ORDER
OF DISMISSAL

AD HOC COALITION FOR WILLAPA)
BAY,)
)
Appellant,)
)
v.)
)
PACIFIC COUNTY; WILLAPA NWR;)
PACIFIC COUNTY WEED BOARD;)
DEPT. OF NATURAL RESOURCES;)
and DEPT. OF FISH & WILDLIFE,)
)
Respondents,)
)
THE NATURE CONSERVANCY,)
)
Petitioner for)
Intervention.)

SHB NO. 94-37

1 | SHOALWATER BAY INDIAN TRIBE,)
2 | Appellant,)
3 | v.)
4 | PACIFIC COUNTY; WILLAPA NWR;)
5 | PACIFIC COUNTY WEED BOARD;)
6 | DEPT. OF NATURAL RESOURCES;)
7 | and DEPT. OF FISH & WILDLIFE,)
8 | Respondents,)
9 | THE NATURE CONSERVANCY,)
10 | Petitioner for)
11 | Intervention.)
12 | AD HOC COALITION FOR WILLAPA)
13 | BAY,)
14 | Appellant,)
15 | v.)
16 | STATE OF WASHINGTON,)
17 | DEPARTMENT OF ECOLOGY,)
18 | DEPARTMENT OF NATURAL)
19 | RESOURCES, DEPARTMENT OF)
20 | FISH & WILDLIFE; and PACIFIC)
21 | COUNTY NOXIOUS WEED BOARD,)
22 | Respondents.)
23 | FRIENDS OF THE EARTH,)
24 | Appellant,)
25 | v.)
26 | STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,
DEPARTMENT OF NATURAL
RESOURCES, DEPARTMENT OF
FISH & WILDLIFE; and PACIFIC
COUNTY NOXIOUS WEED BOARD,
Respondents.

SHB NO. 94-38

PCHB NO. 94-238

PCHB NO. 94-239

1
2 This Settlement Agreement and Stipulated Order of Dismissal
3 is made and entered into by and between the appellants FRIENDS
4 OF THE EARTH (FOE), represented by David E. Ortman; AD HOC
5 COALITION (AD HOC), represented by Michael W. Gendler and
6 Jennifer A. Dold; and SHOALWATER BAY INDIAN TRIBE (TRIBE),
7 represented by Craig A. Jacobson, and the respondent PACIFIC
8 COUNTY NOXIOUS WEED BOARD (PCWB), represented by David Burke;
9 the DEPARTMENT OF ECOLOGY (ECOLOGY), represented by Rebecca A.
10 Vandergriff; and intervenors, the DEPARTMENT OF NATURAL
11 RESOURCES, represented by Michael S. Grossmann and the
12 DEPARTMENT OF FISH AND WILDLIFE; represented by Jay D. Geck.

13 **I. DISPOSITION OF EXISTING LITIGATION.**

14 FOE, Ad Hoc, and the Tribe agree to dismiss their appeal of
15 the shoreline permit issued to the Pacific County Weed Board for
16 the purposes of controlling Spartina in Willapa Bay, Washington.
17 The permit addressed by this Agreement is Shoreline Permit No.
18 93-0090 appealed under SHB No. 94-37.

19 This agreement shall run through the term of the shoreline
20 permit.

21 **II. AMENDMENT OF PCWB SHORELINE PERMIT.**

22 Pacific County shall modify the substantial development
23 permit No. 93-0090 to add the following:

24 1. Prior to undertaking herbicide control of Spartina in
25 Willapa Bay, the permittee shall obtain a WQM from Ecology. The
26

1 | permittee must comply with all requirements of the WQM. If
2 | Ecology issues a WQM for chemical management of Spartina on
3 | private lands in 1995, the WQM shall include the conditions as
4 | described by substantive requirements of sections III and V of
5 | this Agreement.

6 | 2. The WQM application shall contain a detailed
7 | description of the method(s), specify the concentration and
8 | expected volume of Glyphosate and or other adjuvants
9 | (LI-700 only for 1995) approved by Ecology in Willapa Bay and
10 | contained in a WQM, to be applied per acre, and specify the
11 | mitigation and monitoring plans to be incorporated.

12 | It is not the intent of the settling parties to resolve, in
13 | this agreement, the question of whether a substantial
14 | development permit is needed for the management of Spartina in
15 | Willapa Bay.

16 | **III. TEMPORARY WATER QUALITY MODIFICATIONS (WQM'S).**

17 | Glyphosate and LI-700 are the approved herbicide and
18 | surfactant for chemical control of Spartina for 1995.

19 | Ecology will issue a WQM in the following manner:

20 | 1. The PCWB shall exercise good faith efforts to
21 | encourage private landowners or applicators to apply for a WQM
22 | on or before April 1, 1995.

23 | 2. Ecology shall provide FOE, Ad Hoc, and the Tribe with
24 | copies of WQM applications as part of Ecology's 21 day review
25 | process.

1 3. During 1995, Ecology shall only issue WQM's to
2 applicator(s) applying chemicals to private lands that comply
3 with provisions of section V.A. and V.B. of this Agreement,
4 regarding chemical control methods and locations. The
5 appellants will not appeal the WQM's for 1995 if those WQM's
6 comply with the provisions of sections V.A. and V.B. The 1995
7 WQM to be issued by Ecology to private landowners is attached as
8 Exhibit A. Ecology shall not issue a WQM that exceeds one
9 annual treatment season in duration.

10 **IV. STATEMENT OF DEVELOPING MANAGEMENT STRATEGIES TO BE USED BY**
11 **PCWB.**

12 Pacific County and PCWB will balance economic, biological,
13 environmental, and social views in determining the best approach
14 to prevent damage to aquatic lands in Willapa Bay from Spartina
15 and from efforts to manage Spartina. Within that context,
16 chemical herbicidal management, the least preferred alternative,
17 should be used only when other management measures will not
18 provide acceptable protection or prevent significant resource
19 losses. The above statement shall be incorporated into any
20 management plan for Spartina management, and into any addenda,
21 adoption, or supplement to the Noxious Emergent Weed
22 Environmental Impact Statement (EIS).

23 **V. SPARTINA MONITORING AND RESEARCH PROGRAMS.**

24 The parties acknowledge that a long-term program for
25 controlling Spartina should include the generation of
26 information about the impacts and comparative impacts of the
techniques for controlling Spartina. Efforts of Pacific County

1 and PCWB to implement a long-term program of control includes
2 setting priority areas and choosing appropriate control methods.
3 PCWB will be responsible for future updates of the local
4 Integrated Weed Management Plan and any other reports or permits
5 necessary for the continuing management of Spartina. Pacific
6 County and Ecology also have participated in the preparation of
7 the Noxious Emergent Plant EIS that identifies areas in which
8 additional data is desirable. Ecology, through conditions of
9 the 1995 WQM, will support and encourage additional research and
10 monitoring, when proposed or available from federal agencies,
11 groups, or persons and within their legal authority. Whenever
12 possible, Pacific County, PCWB, and Ecology will design or
13 coordinate their research to assist other agencies, groups, or
14 persons. Pacific County and PCWB agree that they have a desire
15 to maximize the quality of the research and monitoring regarding
16 efficacy and impacts of Spartina control methods. Pacific
17 County and PCWB will, within their legal authority, pursue
18 grants for PCWB efforts at research or monitoring. All research
19 or monitoring by parties conducted pursuant to this agreement
20 shall be available to other agencies, persons, or groups
21 conducting research or monitoring and to the appellants, and
22 shall be incorporated into an SEIS.

23 A. Identifying Priority Areas For Control Of Spartina.

24 Characteristics used to determine priority areas for
25 control of Spartina include: the environmental value of habitat
26 being colonized by Spartina, the size of the colony, the age of

1 the Spartina plant, the proximity of colony to rivers and other
2 means of transporting seed, seed production, presence of
3 eelgrass, and targeting those areas with the highest potential
4 for success of controlling Spartina and the least risk of
5 environmental impact to the surrounding invertebrate and
6 botanical communities.

7 Priority areas will be determined each year by the PCWB
8 through the County's IWM plan.

9 1. Priority Areas for Chemical Management.

10 For 1995, the PCWB shall limit chemical control to the
11 following priority areas:

12	GU-2	Toke Point-Cedar River
	GU-9	Stony Point-Wilson Point
13	GU-10	Palix River
	GU-13	Nemah River
14	GU-14	Seal Slough
	GU-23	Porter's Point
15	GU-26	Oysterville
	GU-27	Stackpole
16	GU-28	Leadbetter Point

17 Exhibit B provides estimates of the Spartina coverage
18 within the identified priority units. During 1995 the PCWB shall
19 allow applicators or private landowners to use chemical control
20 methods on no more than 125 net acres of Spartina, either clones
21 or meadows, within the priority areas. The parties agree that
22 the total volume of RODEO used in chemical management of 125 net
23 acres shall not exceed 560 gallons.

1 B. Chemical Control Methods.

2 For 1995, if Ecology issues a WQM, Ecology shall issue a
3 WQM for the following chemical control methods in accordance
4 with the label requirements and the EIS:

5 1. Ecology will not permit aerial chemical control method
6 to be used by any private landowner for 1995.

7 2. Wicking and wiping includes hand application and all-
8 terrain vehicle (ATV) application. Wicking and wiping of
9 Spartina in the priority areas listed above shall be allowed and
10 shall meet label requirements, to include applying the herbicide
11 solution to wet the surface of the plant utilizing a 33%
12 solution of Glyphosate combined with clean water and LI-700
13 added at a rate of 10% by volume of the total solution.
14 Respondents agree that in 1995 the volume of RODEO applied shall
15 not exceed 10 quarts of RODEO per acre when wicking and wiping
16 is the application method. Ecology shall provide FOE, Ad Hoc
17 and the Tribe the spray report verifying the actual volume of
18 Glyphosate and LI-700 applied to the acreage listed above within
19 30 days after treatment.

20 3. Backpack and non-aerial broadcast spraying as
21 identified in the EIS shall be allowed as alternate methods of
22 application with restrictions designed to avoid application of
23 Glyphosate and LI-700 outside of the treatment area. Backpack
24 and non-aerial broadcast spraying as identified in the EIS shall
25 meet label requirements, to include spraying plant surfaces to
26 wet them with a 5% solution of Glyphosate combined with clean

1 water and a 4% solution of LI-700. Respondents agree that in
2 1995 the volume of RODEO applied shall not exceed 18 quarts of
3 RODEO per acre when backpack and non-aerial broadcast spraying
4 as identified in the EIS are the application methods. Ecology
5 shall provide FOE, Ad Hoc and the Tribe the spray report
6 verifying the actual volume of Glyphosate and LI-700 applied to
7 the acreage listed above within 30 days after treatment.

8 4. The quantity and dilution of Glyphosate described in
9 the preceding two paragraphs shall be enforced by Ecology's WQM
10 authority, which includes inspections designed to ensure
11 compliance in both individual applications, sites, and overall
12 compliance with the WQM. It is the intent of the 1995 WQM to
13 require compliance with these standards.

14 5. Control of Spartina using Glyphosate and LI-700 within
15 identified plots will be limited to no more than one treatment
16 application per plant for 1995 with the exception of touch-up
17 wicking applications as permitted in the WQM. Touch-up wicking
18 is defined as applying Glyphosate and LI-700 onto Spartina which
19 had been overlooked in the original treatment. Touch-up wicking
20 is not intended as a second or followup treatment of Spartina.

21 6. To insure Pacific County, PCWB and private landowners'
22 continuing efforts towards appropriate control and effective
23 mitigation, a monitoring plan for 1995, attached hereto as
24 Exhibit C, will be implemented so as to provide information on
25 the impacts of using Glyphosate, compliance with mitigation
26 measures, and treatment efficacy. Exhibit C includes monitoring

1 for impacts and efficacy under a baywide monitoring approach for
2 all control methodologies under IWM.

3 The promises of the parties to this agreement are
4 conditioned on the execution of Exhibit F, which is the Addendum
5 to the Agreement between the Appellants, DNR, DFW, Ecology,
6 Pacific County and PCWB. If PCWB does not receive applications
7 from private landowners granting access to DNR and DFW for
8 monitoring under Exhibit F, then PCWB will take steps under RCW
9 17.10.154 to ensure that private lands are available to DNR and
10 DFW for monitoring. Copies of all monitoring reports shall be
11 provided to FOE, Ad Hoc, and the Tribe upon completion.

12 7. In keeping with WAC 173-201A-110(3)(e)(i) and (ii),
13 the WQM's shall not allow RODEO to be applied during public
14 holidays, and locally identified holidays or celebrations
15 adjacent to or in the immediate vicinity of the area to be
16 treated, and shall require that treatment on weekends be
17 minimized. Weekend treatment may occur if Ecology gives prior
18 authorization.

19 8. For the 1995 WQM, a timing restriction is imposed
20 limiting the application of any and all chemicals from June 1,
21 1995 through September 19, 1995.

22 C. Non-Chemical Means Of Control.

23 1. Selecting Priority Sites.

24 Characteristics used to determine priority areas for
25 control of Spartina include: the environmental value of habitat
26 being colonized by Spartina, the size of the colony, the age of

1 the Spartina plant, the proximity of colony to rivers and other
2 means of transporting seed, seed production, presence of
3 eelgrass, and targeting those areas with the highest potential
4 for success of controlling Spartina and the least risk of
5 environmental impact to the surrounding invertebrate and
6 botanical communities.

7 The parties to this settlement will seek to encourage areas
8 to be managed with non-chemical means in 1995, to assure that
9 control activity, research, or monitoring is not biased towards
10 chemical means of control, as IWM adapts during future years.
11 Non-chemical methods will include hand-pulling seedlings and
12 mowing and or covering of clones and meadows.

13 The PCWB shall make efforts to maintain a public list of
14 non-chemical management resources. This list may include, but
15 is not limited to, the names of individuals or companies who may
16 provide information regarding non-chemical methods of management
17 or names of individuals or companies who may provide bids or
18 services for non-chemical methods of management.

19 D. Primary Applicators For Non-Licensed Private
20 Landowners.

21 Pacific County Weed Board will coordinate the hiring of
22 primary applicators for those non-licensed private landowners
23 seeking to manage Spartina within the priority areas. PCWB will
24 develop a list of applicators for private non-licensed
25 landowners to use when hiring an applicator to treat Spartina on
26 their lands. PCWB will solicit approved applicators as follows:

1. Advertise one day in the Chinook Observer, Aberdeen World and the Willapa Harbor Herald.
 2. Receive list of qualified applicators (contractors).
 3. Review applicators (contractors) according to the following criteria:
 - a. Verify with Department of Agriculture that applicant is a licensed Aquatic Applicator.
 - b. Must attend PCWB workshop prior to being listed on the applicators (contractors) list.
 - c. Applicators will be subject to background check for qualifications, experience, and references.
 - d. PCWB shall contact Department of Agriculture to check on past compliance with license and label requirements.
 - e. Applicator shall perform treatment and monitoring procedures as specified in Ecology's WQM.
- E. Private Landowners And Applicators Applying For WQM To Control Spartina In Willapa Bay.

Pacific County and PCWB shall notify in writing all private landowners within the priority areas of how Spartina can be chemically managed on those properties during 1995, as follows:

1. Interested landowners within the priority areas may contact the PCWB and request a maximum acreage on which they want to chemically manage Spartina. The actual acreage allotment given to any landowner will be based on the following priorities:

- a. Landowners who provide written objective verification (self-serving statement will not be sufficient) that revenues have been derived from their tidelands on Willapa Bay during the prior calendar year will be classified as Priority I landowners. In addition the landowner must certify that revenues have been derived from the same tidelands that they are intending to manage for Spartina.

- 1 b. Landowners who have not derived revenue from
2 their tidelands on Willapa Bay during the prior
3 calendar year will be classified as Priority II
4 landowners.
- 5 c. Priority I landowners will be guaranteed an
6 acreage allotment of up to 10 acres. However, if
7 the overall acreage allotment is not sufficient,
8 the acreage allotment for each Priority I
9 landowner will be prorated downward. If the
10 Priority I landowners do not exhaust the total
11 acreage available based on a maximum of 10 acres
12 per Priority I landowner, the remaining acreage
13 will be made available to Priority II landowners.
14 Each Priority II landowners will be allowed to
15 receive an allotment of up to 10 acres. If there
16 is not sufficient acreage available, the
17 remaining acreage will be prorated downward among
18 Priority II landowners. If the total amount of
19 acreage available has not been exhausted, any
20 acreage remaining shall be allocated among
21 Priority I landowners who desire additional acres
22 on a pro rata basis.

23 2. After signing up for the acreage, the private
24 landowner will obtain the appropriate WQM application from the
25 PCWB. During 1995, Ecology shall have two WQM application
26 forms, FORM A and FORM B, attached hereto as Exhibits D and E.
27 FORM A will be for non-licensed private landowners hiring a
28 primary applicator. FORM B will be for the licensed private
29 landowner applying to his or her own lands.

30 3. The application will be submitted to the PCWB for
31 review, which shall take no more than five days. A copy of FORM
32 A shall be sent to the applicator hired by the private landowner
33 to be incorporated into that applicator's FORM B. FORM B shall
34 be sent to Ecology to begin processing for a WQM.

1 4. After receipt of the WQM application from PCWB,
2 Ecology will process WQM applications according to the
3 following, taking no more than 30 days:

- 4 a. Copies of the WQM application shall be sent to
5 interested parties including the Appellants for a
6 21-day review.
7
8 b. Ecology shall issue a determination under SEPA
9 requirements.
10
11 c. Ecology shall issue or deny the WQM, as
12 appropriate, and send copies to interested
13 parties, including the Appellants.

14 5. For 1995, PCWB and Ecology will use the following
15 criteria to screen Form A and Form B to determine which control
16 methods are most appropriate for the subject property, thereby
17 implementing IWM for the management of Spartina:

- 18 • Nature of the substrate (Muddy, Sand or Firm);
19
20 • Age and type of Spartina (Seedlings, Clones and
21 Meadows);
22
23 • Size of clones and meadows (number of acres),
24 including consideration of prevention of
25 seedlings and prevention of seed production;
26
27 • What impacts may be caused accessing the Spartina
28 plot to be controlled, e.g. number of trips onto
29 the mudflats, the methods used to access the
30 plot, or accessibility of the site;
31
32 • Other mitigating circumstances, e.g. displaced
33 habitat, presence of eelgrass, or seed transfer.

34 The PCWB and Ecology also will balance environmental,
35 biological, and economic costs, with the recognition that
36 chemical management is the least preferred alternative as stated
37 in Section IV.

1 F. Private Landowners Outside Of Priority Areas Seeking
2 To Chemically Manage Spartina.

3 During 1995, private landowners who apply to use chemical
4 control methods and who fall outside of the priority areas may
5 themselves apply or may have an applicator apply to Ecology for
6 a WQM pursuant to V.E.2. During 1995, Ecology may only issue a
7 WQM to an applicator or a private landowner if Spartina
8 threatens adjacent oyster beds or ecologically sensitive areas
9 such as rivers, eelgrass, or bird habitat identified by USFW or
10 Washington State Fish and Wildlife. Backpack spraying or wiping
11 of clones using the six-foot fire lane approach shall be the
12 only chemical control method allowed in these areas. The intent
13 of the fire lane approach is to prevent Spartina from
14 encroaching on the ecologically sensitive area. The six-foot
15 fire lane approach is defined as spraying or wiping clones from
16 the active, spreading edge of Spartina no more than six-feet
17 inward. The PCWB and Ecology shall use the criteria in Section
18 V.E.5. to review WQM applications under this section.

19 During 1995, the PCWB shall allow applicators or private
20 landowners to use chemical control methods on no more than 5 net
21 acres of Spartina clones within non-priority areas. The parties
22 agree that the total volume of RODEO used in chemical management
23 of net acres shall not exceed 20 gallons. Any WQM issued
24 pursuant to this section shall require monitoring as stated in
25 Exhibit C. Any WQM issued under this section shall be
26 appealable.

1 VI. OTHER TERMS.

2 G. Dispute Resolution And Enforcement.

3 This Agreement is enforceable by any party to the
4 Agreement. Prior to raising by motion, complaint or other legal
5 proceeding any alleged violation of this Agreement, or any other
6 alleged failure to perform any obligation imposed hereby, the
7 aggrieved party shall first consult with the other parties
8 consistent with the procedure outlined in Rule 26(i) of the
9 Washington Superior Court Civil Rules, and, in the event the
10 matter cannot be resolved, confirm such consultation in written
11 correspondence to the alleged breaching party. If no agreement
12 can be reached within 10 days from receipt of the letter, the
13 parties will then submit the dispute to Washington Arbitrator
14 and Mediation Services or other agreed upon mediator for
15 mediation first, and if that does not resolve the issue, then
16 the parties may submit the dispute to binding arbitration or
17 pursue any other remedies available by law. In an emergency,
18 settling parties may bypass this alternative dispute resolution
19 agreement and apply to a court or an appropriate administrative
20 agency for injunctive relief. Parties shall not be relieved of
21 the duty to participate in conferences or mediation upon
22 resolution of the emergency.

23 H. Authority To Sign.

24 Each of the parties signing this Agreement is legally
25 authorized to enter into the terms and conditions of this
26

1 Agreement and Stipulation and Order of Dismissal of proceedings,
2 and is legally authorized to bind such parties hereto.

3 I. Choice Of Law.

4 This Agreement shall be governed by and construed in
5 accordance with the laws of the State of Washington.

6 J. Modification.

7 This Agreement may be modified only by the express written
8 agreement of all parties.

9 K. Counterparts and Effective Date.

10 This Agreement may be executed in counterparts and each
11 executed counterpart shall have the same force and effect as an
12 original instrument upon the effective date of the Agreement.
13 This Agreement shall become effective as to all parties upon the
14 date of signature of the party last in time to sign.

15 DATED this 16th day of JANUARY, 1995.

16
17 JENNIFER DOLD
18 JENNIFER DOLD, # 33822
19 Attorney for AD HOC
COALITION FOR WILLAPA BAY

DAVID E. ORTMAN
Representative
FRIENDS OF THE EARTH

20
21 CRAIG JACOBSON
22 SHOALWATER BAY INDIAN TRIBE

DAVID J. BURKE, #
Attorney for PACIFIC COUNTY
and PACIFIC COUNTY WEED BOARD

23
24
25 REBECCA A. VANDERGRIFF, #16877
26 Assistant Attorney General
DEPARTMENT OF ECOLOGY

WILLIAM H. BAKOUS, Supervisor
Water Quality Program, SWRO

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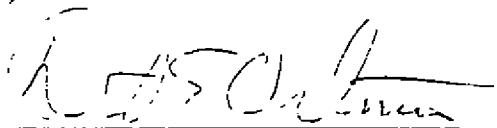
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12 original instrument upon the effective date of the Agreement.
13 This Agreement shall become effective as to all parties upon the
14 date of signature of the party last in time to sign.

15 DATED this 18 day of September, 1975.

16
17
18 _____
19 JENNIFER DOLD, #
Attorney for AD HOC
COALITION FOR WILLAPA BAY

20
21
22 
23 _____
DAVID E. ORTMAN
Representative
FRIENDS OF THE EARTH

24
25 _____
26 CRAIG JACOBSON
SHOALWATER BAY INDIAN TRIBE

27
28 _____
29 DAVID J. BURKE, #
Attorney for PACIFIC COUNTY
and PACIFIC COUNTY WEED BOARD

30
31 _____
32 REBECCA A. VANDERGRIFF, #16877
Assistant Attorney General
DEPARTMENT OF ECOLOGY

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34 _____
35 WILLIAM H. BAKOUS, Supervisor
Water Quality Program, SWRO

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15 DATED this ____ day of _____, 19____.

16
17
18 JENNIFER DOLD, #
19 Attorney for AD HOC
COALITION FOR WILLAPA BAY

DAVID E. ORTMAN
Representative
FRIENDS OF THE EARTH

20
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Attorney for PACIFIC COUNTY
and PACIFIC COUNTY WEED BOARD

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Water Quality Program, SWRO

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15 DATED this ____ day of _____, 19__.

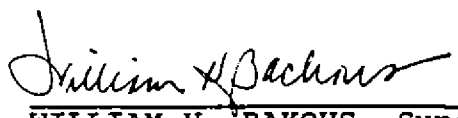
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COALITION FOR WILLAPA BAY

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Representative
FRIENDS OF THE EARTH

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21
22 CRAIG JACOBSON
SHOALWATER BAY INDIAN TRIBE

David J Burke
DAVID J. BURKE, #16163
Attorney for PACIFIC COUNTY
and PACIFIC COUNTY WEED BOARD

23
24 
25 REBECCA A. VANDERGRIFF, #16977
Assistant Attorney General
26 DEPARTMENT OF ECOLOGY


WILLIAM H. BAKOUS, Supervisor
Water Quality Program, SWRO

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26	STATE OF WASHINGTON,)	
	DEPARTMENT OF ECOLOGY,)	
	DEPARTMENT OF NATURAL)	
	RESOURCES, DEPARTMENT OF)	
	FISH & WILDLIFE; and PACIFIC)	
	COUNTY NOXIOUS WEED BOARD,)	
	Respondents.)	

1 This Stipulated Order of Dismissal is made and entered into
2 by and between the appellants FRIENDS OF THE EARTH (FOE),
3 represented by David E. Ortman; AD HOC COALITION (AD HOC),
4 represented by Michael W. Gendler and Jennifer A. Dold; and
5 SHOALWATER BAY INDIAN TRIBE (TRIBE), represented by Craig A.
6 Jacobson, and the respondents STATE OF WASHINGTON DEPARTMENT OF
7 NATURAL RESOURCES (DNR) and DEPARTMENT OF FISH & WILDLIFE (DFW),
8 represented by Michael S. Grossmann and Jay D. Geck; the
9 DEPARTMENT OF ECOLOGY (ECOLOGY), represented by Rebecca A.
10 Vandergriff; and PACIFIC COUNTY and the PACIFIC COUNTY WEED BOARD,
11 represented by David Burke.

12 STIPULATION

13 The parties to this stipulation agree as follows:

- 14 1. DNR and DFW have executed a Settlement Agreement with the
15 Appellants and Appellant-Intervenors (hereinafter the "Settling
16 Parties"). The Settlement Agreement is attached hereto as
17 Exhibit A.
- 18 2. The Settling Parties agree that the terms of the settlement
19 agreement establish binding obligations for the Settling Parties,
20 require Pacific County to amend the terms of the shoreline permits
21 for DNR (No. 94-0001) and DFW (No. 94-0005), and require the
22 Department of Ecology to amend the orders establishing short term
23 water quality modifications for DNR (No. DE 94 WQ-S288) and DFW
24 (No. DE 94 WQ-S246).
- 25
26

1 3. Based upon the Settling Parties' agreement to fulfill the
2 terms and conditions of the Settlement Agreement, the Settling
3 Parties agree that the appeals filed by the Ad Hoc Coalition for
4 Willapa Bay, the Friends of the Earth and the Shoalwater Bay
5 Indian Tribe with respect to the permits issued to DNR and DFW
6 shall be dismissed.


7 4. The parties to the above captioned matter have not been able
8 to settle the appeals that have been filed with respect to the
9 shoreline permit issued to the Pacific County Weed Board
10 (No. 93-0090). The parties agree that settlement negotiations
11 attempting to settle this appeal should continue and that the
12 Hearing date for this appeal should be struck and rescheduled for
13 December 12 - 16, 1994 as a primary setting with a back up setting
14 of January 9 - 13, 1995. The parties agree that DNR, DFW and
15 ECOLOGY shall remain as intervening parties in this action, but
16 that such participation shall have no effect upon the Settlement
17 Agreement or upon the dismissal of the appeals referenced in
18 paragraph 3.

19 DATED this 27th day of December, 1994.

21 _____
22 JENNIFER DOLD, #23822
23 Attorney for AD HOC
24 COALITION FOR WILLAPA BAY

DAVID E. ORTMAN
Representative
FRIENDS OF THE EARTH

25 _____
26 CRAIG JACOBSON
SHOALWATER BAY INDIAN TRIBE



MICHAEL S. GROSSMANN, #15293
Assistant Attorney General
DEPT. OF NATURAL RESOURCES

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8 to settle the appeals that have been filed with respect to the
9 shoreline permit issued to the Pacific County Weed Board
10 (No. 93-0090). The parties agree that negotiations attempting to
11 settle this appeal should continue and that the Hearing date for
12 this appeal should be struck and rescheduled for January 9 - 13,
13 1995. The parties agree that DNR, DFW ^{and} ~~and ECOLOGI~~ may remain as
14 intervening parties in this action, but that such participation
15 shall have no effect upon the Settlement Agreement or upon the
16 dismissal of the appeals referenced in paragraph 3.

17 DATED this ____ day of November, 1994.

18
19 

20 JENNIFER DOLD, # 23822
21 Attorney for AD HOC
22 COALITION FOR WILLAPA BAY

23 DAVID E. ORTMAN
24 Representative
25 FRIENDS OF THE EARTH

26 CRAIG JACOBSON
SHOALWATER BAY INDIAN TRIBE

MICHAEL S. GROSSMANN, # 15293
Assistant Attorney General
DEPT. OF NATURAL RESOURCES

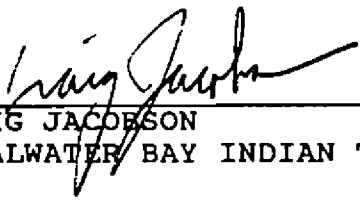
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12 this appeal should be struck and rescheduled for January 9 - 13,
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14 intervening parties in this action, but that such participation
15 shall have no effect upon the Settlement Agreement or upon the
16 dismissal of the appeals referenced in paragraph 3.

17 DATED this ____ day of November, 1994.

18
19
20 JENNIFER DOLD, # 23822
Attorney for AD HOC
COALITION FOR WILLAPA BAY

DAVID E. ORTMAN
Representative
FRIENDS OF THE EARTH

21
22 
23 CRAIG JACOBSON
24 SHOALWATER BAY INDIAN TRIBE


MICHAEL S. GROSSMANN, # 15293
Assistant Attorney General
DEPT. OF NATURAL RESOURCES

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12 this appeal should be struck and rescheduled for January 9 - 13,
13 1995. The parties agree that DNR, DFW ^{DNR} ~~and ECOLOGY~~ ^R may remain as
14 intervening parties in this action, but that such participation
15 shall have no effect upon the Settlement Agreement or upon the
16 dismissal of the appeals referenced in paragraph 3.

17 DATED this 8th day of ~~November~~, 1994
December

18
19 _____
20 JENNIFER DOLD, # 23822
21 Attorney for AD HOC
22 COALITION FOR WILLAPA BAY


23 DAVID E. ORTMAN
24 Representative
25 FRIENDS OF THE EARTH


26 _____
27 CRAIG JACOBSON
28 SHOALWATER BAY INDIAN TRIBE

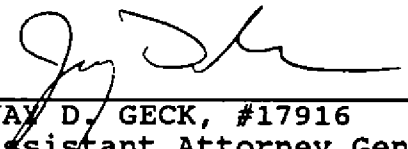
29 _____
30 MICHAEL S. GROSSMANN, # 15293
31 Assistant Attorney General
32 DEPT. OF NATURAL RESOURCES

33 SETTLEMENT AGREEMENT AND
34 STIPULATED ORDER OF DISMISSAL - 4
35 TS/epd:ls

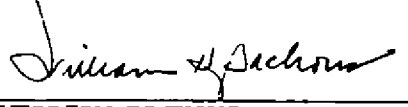
36 ATTORNEY GENERAL OF WASHINGTON
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39 Olympia, WA 98504-0100
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REBECCA A. VANDERGRIFF, #16877
Assistant Attorney General
DEPT. OF ECOLOGY


JAY D. GECK, #17916
Assistant Attorney General
DEPT. OF FISH & WILDLIFE

DAVID J. BURKE, #
Attorney for
PACIFIC COUNTY and
PACIFIC COUNTY WEED BOARD


WILLIAM BACKOUS
Supervisor, Water Quality Program
Department of Ecology, SWRO

ORDER

Based upon the foregoing Stipulation and Agreement, it is hereby ORDERED that:

1. The shoreline permits issued by Pacific County to DNR (No. 94-0001) and DFW (No. 94-0005) shall be modified in accordance with the provisions of Exhibit A.
2. The ECOLOGY short term water quality modifications orders for DNR (No. DE 94 WQ-S288) and DFW (No. DE 94 WQ-S246) shall be modified in accordance with the provisions of Exhibit A.
3. The appeals of the shoreline permits and water quality modification orders referenced in paragraph 2 that were filed by the Ad Hoc Coalition for Willapa Bay, the Friends of the Earth and the Shoalwater Bay Indian Tribe are dismissed.
4. The hearing date for the remaining appeals of the Pacific County Weed Board's shoreline permit (No. 93-0090) is struck and rescheduled for January 9 - 13, 1995.

1 REBECCA A. VANDERGRIFF, # 16877
2 Assistant Attorney General
3 DEPT. OF ECOLOGY

JAY D. GECK, # 17916
Assistant Attorney General
DEPT. OF FISH & WILDLIFE

4 David J. Burke
5 DAVID J. BURKE, # 16163
6 Attorney for
7 PACIFIC COUNTY and
8 PACIFIC COUNTY WEED BOARD

William Backus
WILLIAM BACKUS
Supervisor, Water Quality Program
Department of Ecology, SWRO

9 ORDER

10 Based upon the foregoing Stipulation and Agreement, it is
11 hereby ORDERED that:

12 1. The shoreline permits issued by Pacific County to DNR
13 (No. 94-0001) and DFW (No. 94-0005) shall be modified in
14 accordance with the provisions of Exhibit A.

15 2. The ECOLOGY short term water quality modifications orders for
16 DNR (No. DE 94 WQ-S288) and DFW (No. DE 94 WQ-S246) shall be
17 modified in accordance with the provisions of Exhibit A.

18 3. The appeals of the shoreline permits and water quality
19 modification orders referenced in paragraph 2 that were filed by
20 the Ad Hoc Coalition for Willapa Bay, the Friends of the Earth and
21 the Shoalwater Bay Indian Tribe are dismissed.

22 ~~4. The hearing date for the remaining appeals of the Pacific~~
23 ~~County Weed Board's shoreline permit (No. 93-0090) is struck and~~
24 ~~rescheduled for January 9 - 13, 1995.~~

25 ///

26 ///

///

DK DWT RVT
5. DNR, DFW ~~and ECOL~~ are granted leave to intervene in the remaining appeal.

SO ORDERED this 24th day of January, 1995.

SHORELINES HEARINGS BOARD

POLLUTION CONTROL HEARINGS BOARD

James A. Tupper, Jr.
JAMES A. TUPPER, JR., Presiding

Robert V. Jensen
ROBERT V. JENSEN, Chairman PCHB

Richard C. Kelley
RICHARD C. KELLEY, member

Bobbi Krebs-McMullen
BOBBI KREBBS-MCMULLEN, member

Jim Lynch
JIM LYNCH, member

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ENVIRONMENTAL
HEARINGS OFFICE

BEFORE THE SHORELINES HEARINGS BOARD AND
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

FRIENDS OF THE EARTH,

Appellant,

v.

PACIFIC COUNTY; WILLAPA NWR;
PACIFIC COUNTY WEED BOARD;
DEPT. OF NATURAL RESOURCES;
and DEPT. OF FISH & WILDLIFE,

Respondents,

THE NATURE CONSERVANCY,

Petitioner for
Intervention.

AD HOC COALITION FOR WILLAPA
BAY,

Appellant,

v.

PACIFIC COUNTY; WILLAPA NWR;
PACIFIC COUNTY WEED BOARD;
DEPT. OF NATURAL RESOURCES;
and DEPT. OF FISH & WILDLIFE,

Respondents,

THE NATURE CONSERVANCY,

Petitioner for
Intervention.

SHB NO. 94-33

STIPULATED ORDER
OF DISMISSAL

ORIGINAL

SHB NO. 94-37

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

FRIENDS OF THE EARTH,) SHB NO. 94-33

Appellant,)

v.)

PACIFIC COUNTY; WILLAPA NWR;)
PACIFIC COUNTY WEED BOARD;)
DNR AQUATIC LANDS; and DEPT.)
OF FISH & WILDLIFE;)

Respondents.)

AD HOC COALITION FOR WILLAPA) SHB NO. 94-37
BAY,)

Appellant,)

v.)

PACIFIC COUNTY; WILLAPA NWR;)
PACIFIC COUNTY WEED BOARD;)
DNR AQUATIC LANDS; and DEPT.)
OF FISH & WILDLIFE;)

Respondents.)

SHOALWATER BAY INDIAN TRIBE,) SHB NO. 94-38

Appellant,)

v.)

PACIFIC COUNTY; WILLAPA NWR;)
PACIFIC COUNTY WEED BOARD;)
DNR AQUATIC LANDS; and DEPT.)
OF FISH & WILDLIFE;)

Respondents.)

ORDER DENYING
SUMMARY JUDGMENT AND
MOTION REGARDING
APPLICABILITY OF STAY

1 This matter comes before the Shorelines Hearings Board ("Board") on motions for
2 summary judgment brought by respondents. The Nature Conservancy, the State of
3 Washington Department of Natural Resources and the State of Washington Department
4 of Fish and Wildlife. The Nature Conservancy also requests a determination as to
5 whether the stay provisions of the Shoreline Management Act apply to the activities
6 authorized under the shoreline permits on appeal. The Board in this matter is comprised
7 of James A. Tupper, Jr., presiding, Robert V. Jensen, Richard C. Kelley, Bobbi Krebs-
8 McMullen, Traci Goodwin and Jim Lynch.

9 Oral argument on the motions was heard on October 28, 1994. The Nature
10 Conservancy appeared by and through its attorney James R. Rasband. The Department of
11 Natural Resources appeared by and through assistant attorney general Michael S.
12 Grossman. The Friends of the Earth appeared by and through David E. Ortman. The Ad
13 Hoc Coalition for Willapa appeared by and through its attorneys Michael W. Gendler and
14 Jennifer Dold. Pacific County and the Pacific County Weed Board appeared by and
15 through their attorney David J. Burke.

16 Court reporting services were provided by Kim Otis of Gene Barker and
17 Associates of Olympia, Washington.

18 The Board reviewed and considered the following pleadings and documents filed
19 in support and in opposition to the motions for summary judgment.

20 1. The Nature Conservancy's Motion for Summary Judgment.

21 2. The Nature Conservancy's Memorandum in Support of Motion for Summary
22 Judgment.

23 3. Declaration of James R. Rasband in Support of The Nature Conservancy's
24 Motion for Summary Judgment.

25 4. Respondents Departments of Natural Resources and Fish and Wildlife's
26 Motion for Summary Judgment.

1 5 Affidavit of Michael S Grossman in Support of Motion for Summary
2 Judgment

3 6 Statement of Pacific County and Pacific County Weed Board in Support of the
4 Motions Filed by The Nature Conservancy and attached declaration

5 7 Friends of the Earth's Memorandum in Opposition of Motion for Summary
6 Judgment

7 8 Memorandum of Appellant Ad Hoc Coalition for Willapa Bay in Opposition to
8 Motions for Summary Judgment

9 9 Memorandum in Opposition of Motion for Summary Judgment filed by the
10 Shoalwater Bay Indian Tribe

11 10 The Nature Conservancy's Reply in Support of Summary Judgment

12 11 State of Washington Department of Natural Resources and Department of
13 Fish and Wildlife's Reply Memorandum in Support of Their Motion for Summary
14 Judgment

15 The Board reviewed and considered the follow pleadings and documents in
16 support and in opposition to the motion regarding the applicability of the Shoreline
17 Management Act stay provision

18 1 The Nature Conservancy Motion and Memorandum in Support of Motion for
19 Declaration Regarding Inapplicability of "Automatic Stay "

20 2 Federal Fish and Wildlife Service Response to The Nature Conservancy
21 Motions for Summary Judgment and Stay Declaration

22 3 Memorandum of Appellant Ad Hoc Coalition for Willapa Bay in Opposition to
23 Nature Conservancy Motion Re Automatic Stay

24 4 Shoalwater Bay Indian Tribe Memorandum in Support of Applicability of
25 Stay

26 5 Friends of the Earth's Memorandum in Opposition of Motion for Declaration
27 Regarding Inapplicability of "Automatic Stay "

1 6 The Nature Conservancy's Reply in Support of Motion for Declaration
2 Regarding Inapplicability of Automatic Stay

3 Based on review of the foregoing pleadings, consideration of oral argument by
4 counsel for the parties, and being otherwise fully apprised in the circumstances of the
5 motions for summary judgment, the Board enters the following

6 FINDINGS OF FACT

7 I

8 On March 3, 1994 Pacific County issued Shoreline Substantial Development
9 Permits to DNR and DF&W The Pacific County Board of Commissioners upheld the
10 issuance of the permits on April 26, 1994 The permits authorize the applicants to
11 undertake measures to control and eliminate spartina grass from tidelands within Willapa
12 Bay In pertinent part, the permits provide

13 To control Spartina Alterniflora by implementing the integrated weed
14 management plan described in the Noxious Emergent Plants Management
15 EIS dated November 1993 and as further specified in the "Spartina
Management Program, Integrated Weed Management for State-Owned
Aquatic Lands Managed by the Department of Natural Resources "

16 The Spartina Management Program dated February 9, 1994, is attached and incorporated
17 in the permits issued to DNR and DF&W The document contains a management
18 program applicable to all DNR managed tidelands affected by spartina as well as a
19 regional plan for Willapa Bay Both the management program and regional plan are
20 styled as "proposed " There is no indication that final plans have been adopted

21 II

22 Spartina alterniflora or smooth cord grass is one of three non-native and invasive
23 spartina species present wetlands and estuaries along the Washington coast, Puget Sound
24 and San Juan Islands Spartina alterniflora (hereafter "spartina"), is characterized by
25 distinct circular growth patterns, referred to as clones It grows at a much lower tidal
26 elevation than native Washington salt marsh plants Lower tidal elevations in

1 Washington generally appear to be barren but are in fact colonized with zooplankton,
2 diatoms, algae, invertebrate communities and eel grasses. As spartina extends its range
3 into lower tidal areas it accumulates sediments and gradually fills in a marsh changing it
4 to a habitat more like the natural range of spartina in the Gulf and south Atlantic coasts.
5 This transformation renders the water shallower, thus raising the level of the marsh, raises
6 the temperature of the water and thereby destroys natural habitat. The warmer and
7 shallower water in the summer and El Niño effects in the winter during recent years has
8 probably enhanced the ability of spartina to produce viable seed. Spartina has been
9 designated by the State Noxious Weed Board as a Class B noxious weed in Pacific
10 County posing a serious threat to the region. By virtue of this designation, landowners
11 must contain and control spartina when notified by the local weed board.

12 III

13 Spartina was introduced to Willapa Bay in the late 1800's and early 1900's as
14 packing for Oyster seedlings brought from the east coast. From this introduction, and its
15 introduction to Padilla Bay in the 1960's, spartina has spread from Willapa Bay into the
16 Grays Harbor and Copalis estuaries, and to the northeastern shores of Jefferson County
17 and Sequim Bay. The most extensive colony of spartina in the state is in Willapa Bay.
18 The threat of damage to native marsh and tidal communities and to the shellfish industry
19 in Pacific County is greater in Willapa Bay than in any other part of the spartina range in
20 Washington. At risk are the Willapa National Wildlife Refuge (managed by the United
21 States Fish and Wildlife Service), Leadbetter State Park, Shoalwater Bay and thousands
22 of acres of commercial oyster beds.

23 IV

24 The proposed Willapa Bay regional plan for spartina management adopts the 1993
25 EIS and the preferred alternative in that document for Integrated Weed Management
26 ("IWM"). The IWM is described as a problem-solving approach that calls for analyzing
27 the biology of the weedy species, evaluating its potential for environmental damage, then

determining which control method will be most effective and appropriate for a given geographic location. The proposed plan for Willapa Bay divides the bay into 37 geographic management units. Of these units, the proposed plan identifies eight units for priority action in the next three years. Control methods proposed for these units vary but include hand pulling and burning seedlings, tractor and walk-behind mowers, possible Rodeo® wiping applications, and trial helicopter application of full label rate Rodeo® at some units. As noted, the Willapa Bay regional plan does appear to have been finalized. The plan does not provide specific information as to what combination of control measures will be applied to each of the priority units. The proposed project for Unit 27 simply states that "[c]ontrol and containment need to continue here," and "[c]ontrol with walk-behind mowers and/or small tractors will also be appropriate." Likewise, the proposed project for Unit 19 simply states, "Because of its proximity to the Long Island channel, rapid expansion of the meadow, and viable seed production clones in this Unit, needs to be controlled to stop seed set."

It is also unclear if the shoreline permits on appeal cover only the priority actions identified in the plan, or the conceptual approach detailed in the plan for developing unit specific strategies in the future. It would appear that the permit would allow any combination of the selected management methods - hand pulling, weeding torch, mowers and Rodeo® - to be applied to any management unit within the Bay at the discretion of the applicants. The DNR management plan sets a framework for addressing all three species of spartina present throughout the region. The proposed plan for Willapa Bay is the first such regional plan to have been drafted. Similar plans are being developed for Puget Sound, the San Juan Islands, Hood Canal, the Strait of Juan de Fuca, Grays Harbor and other Olympic coast estuaries. Future plans are intended to adopt the same approach of the proposed Willapa Bay plan by identifying priorities, management methods and then site or unit specific actions.

1 Rodeo® is a trade name for glyphosate, the only herbicide labeled for use
2 estuaries in Washington. Preliminary studies of the effectiveness of this herbicide in
3 Willapa Bay described in the regional plan and EIS indicate that it can be effective but is
4 limited by its rapid breakdown and slow absorption time. It is also inactivated by
5 sediments and water containing iron. In a 1993 study reported in the EIS, Rodeo® was
6 not found to be effective applied by means of aerial spraying at a concentration rate close
7 to the lowest recommended application rate. The product was, however, found effective
8 by ground application at the same concentrations. Several of the priority projects
9 identified in the regional plan, such as Unit 27 and Unit 28, contemplate aerial spraying at
10 the maximum label concentration. The studies performed for the EIS did not, however,
11 evaluate the impact of using Rodeo® at maximum strength or the long-term effect on
12 some of the test organisms. These studies were also limited to evaluation of organism
13 abundance and do not provide any information on non-lethal effects of using glyphosate.
14 The EIS also identifies information needs for use of herbicides to control weeds. Listed
15 as a major data need is the potential toxic effects of using the maximum aerial application
16 rate in Washington marine environments. Also listed as major data needs are information
17 related to the efficacy and best application methods for glyphosate and quantification of
18 glyphosate degradation and persistence in both freshwater and salt marsh sediments. In
19 addition to this information, the EIS lists the following other data needs:

- 20 - Confirmation of the hypothesis that glyphosate application will not cause
21 growth inhibition of organisms at the base of the food web or other
22 adverse acute or chronic effects
- 23 - Potential effects of glyphosate applications on surface water nutrient
24 availability and marine microlayer
- 25 - Additional lethal toxicity information for bird groups that use wetland
26 areas

- Additional lethal and non-lethal toxicity information to more accurately assess the potential effects of glyphosate on salmonids and other fishes
- Additional information to assess the potential cancer, fetal, and reproductive effects of pure glyphosate on salmonids and other fishes
- Additional information on the potential cancer, fetal, and reproductive effects of glyphosate and Rodeo®/nonionic surfactant mixtures to ecologically and commercially important invertebrates such as amphipods, Dungeness crab, mussels, clams, and oysters
- Acute or chronic effects of glyphosate on amphibians and reptiles
- Environmental fate and effects of surfactants

The Spartina management program incorporates the 1993 EIS. In doing so, the plan states: "Based on the previous studies, and the field work done in 1992 for the EIS, no significant long term impacts from the use of this chemical are expected." As a program strategy the Spartina management program states that DNR will issue a SEPA determination of significance for each IWM and then adopt the EIS with additional site specific information and SEPA checklists where appropriate. This was the procedure applied to the Willapa Bay regional plan. It is unclear from the record before the Board, however, whether any additional studies or site specific information were developed to support the proposed plan.

VI

The appeals in this case focus on authorization under the permits to use glyphosate. The Friends of the Earth has also challenged the procedural propriety of the permits. It alleges that Pacific County did not fully consider all public comments by approving the permits before the time period for public comment had expired. While this issue was excluded from the Prehearing Order, Friends of the Earth has separately requested that the Board amend the order to include this issue and moved for summary judgment and an order remanding the permits to Pacific County for reconsideration. Aside from any procedural concerns, the issues raised in the Prehearing Order relate to

1 the use of an herbicide to control spartina That is, the appellants do not seek reversal, on
2 substantive grounds, of the permit authorization for non-chemical control of spartina
3 outlined in the regional plan

4 VII

5 On March 25, 1994 DNR and DF&W received Hydraulic Permit Approvals from
6 DF&W for the mechanical controls of spartina under the proposed regional plan On
7 September 9, 1994, the Washington Department of Ecology issued DNR and DF&W
8 orders for the temporary modification of water quality standards for the purpose of
9 applying Rodeo® and the surfactant LI-700® The orders limit the state agencies to one
10 application or treatment per unit during the growing season from April 1, 1995, through
11 September 9, 1995, when tides are expected to be low enough to allow the plant's leaves
12 to be dry for at least six hours The orders also require that signs be posted in any area
13 normally accessible from the shore to people using the access areas If the areas are
14 normally accessible from the water, signs must be placed facing the water every 100 feet
15 The orders require that the signs contain the following information

16 Caution

17 Glyphosate (Rodeo) will be applied under permit to these waters on
18 _____ to control aquatic vegetation

19 No water use restrictions are in place

20 Treated water may be used for Swimming, Fish Consumption, and
21 Irrigation immediately after treatment

22 Friends of the Earth, the Ad Hoc Coalition and the Shoalwater Bay Indians (as
23 intervenor) have appealed the temporary modification of water quality standard permits
24 to the Pollution Control Hearings Board By amended prehearing order these appeals
25 have been consolidated for a joint final hearing before both the Shorelines and Pollution
26 Control Hearings Boards

VIII

Any conclusion of law deemed to be a finding of fact is hereby adopted as such
Based on the foregoing findings of fact, the Board enters the following

CONCLUSIONS OF LAW

I

The Board has jurisdiction over this matter pursuant to RCW 90 58 180

II

This matter comes before the Board on a motion for summary judgment
Summary judgment is appropriate under the rules of this Board and CR 56 where there
are no genuine issues of material fact and a party is entitled to judgment as a matter of
law We conclude that there are genuine issues of material fact and that the motions for
summary judgment should be denied

III

The issue before the Board is whether the actions authorized under the shoreline
permits on appeal, being those activities outlined in the proposed Willapa Bay Regional
Plan, constitute "development" within the meaning of the Shoreline Management Act
("SMA") or the Pacific County Shoreline Master Program ("PCSMP") If the activities
are not development, then no shoreline permit is required and these appeals should be
dismissed RCW 90 58 140 The SMA definition of development provides,

(d) "Development" means a use consisting of the construction or exterior
alteration of structures, dredging, drilling, dumping, filling, removal of
any sand, gravel, or minerals, bulkheading, driving of piling, placing of
obstructions, or any project of a permanent or temporary nature which
interferes with the normal public use on the surface of waters overlying
lands subject to this chapter at any state of water level

(e) "Substantial development" shall mean any development of which the
total cost or fair market value exceeds \$2,500, for any development which
materially interferes with the normal public use of the water or shorelines
of the state

IV

Appellants have established a genuine issue of material fact as to whether the actions proposed under the shoreline permits will interfere with normal public use of the shorelines. There are two aspects to this issue. Appellants argue that interference with use will occur during both mechanical and chemical weed control activities. During those times the public will not have access to areas of the control work. Respondents reply with some merit that this postulation leads to the absurd result of requiring a shoreline permit any time a public or private party seeks to maintain a shoreline area with public access. Normal public use of shorelines must encompass periods of maintenance activities. The definition of development does not contemplate that permits would be required for such activities as cleanup, lawn mowing, routine dock maintenance or the like. Respondents also point out that the glyphosate spraying, as permitted by Ecology, will not limit public use immediately after spraying. It is also significant that the Ecology orders limit application of glyphosate to periods of extended low tide when the dominate public use by boating would not be an issue. The Board is nonetheless presented with a permit that authorizes activities covering an large geographic area over an extended period of time. As the DNR regional plan states, the effort to control spartina will take decades. The cumulative impact of this ongoing effort raises an issue of fact as to interference with normal public use within the definition of development. This Board has previously held that a proposed activity constitutes development where public use will be highly disrupted during the proposed activity. English Bay Enterprises, Ltd. v Island County, SHB No 185 at 11 (1975).

V

The second aspect of the proposed activities with respect to normal public use is whether the use of glyphosate to control spartina would result in long term significant adverse impacts to the environment. If the Board was presented with a proposed control

1 program that by design intended to sacrifice certain elements of the Willapa Bay
2 environment, e g , benthic communities, invertebrates or eel grass habitat, the action
3 would constitute an interference with normal public use of the bay This follows since
4 the public use of Willapa Bay is intricately linked to the enjoyment of the natural
5 resources afforded by the existing environment If the actions to control spartina destroy
6 natural habitat, there would be a degradation of normal public use The 1993 EIS
7 establishes a genuine issue of material fact in this regard The regional plan proposes full
8 label strength aerial applications of glyphosate on Units 27 and 28 that were not studied
9 in the development of the EIS There is, moreover, no restriction in the shoreline permits
10 or the Ecology orders that would prevent the state agencies from adopting the same
11 control method for all 37 management units in Willapa Bay The EIS, however, raises
12 concerns about the impact of full label strength aerial spraying and set forth an extensive
13 list of additional studies that would be necessary to support this type of application The
14 respondents have not established the absence of a genuine issue of material fact as to the
15 ultimate long term impact of this type of glyphosate spraying on Willapa Bay There is
16 thus an issue of fact as to whether use of glyphosate will result in a significant lowering
17 of recreational and aesthetic quality on which normal public use of Willapa Bay is
18 dependent English Bay Enterprises, Ltd v Island County, id.

19 VI

20 The Board concludes that there are genuine issues of material fact as to whether
21 the activities authorized under the permits constitute interference with normal public use
22 within the meaning of RCW 90 58 030 Having reached this conclusion, the Board has
23 not addressed the merits of appellants' additional arguments as to why the proposed
24 activities constitute development

25 VII

26 The Nature Conservancy separately requests a determination that the stay
27 provisions of RCW 90 58 140(5) do not apply Having reviewed the pleadings and

arguments in support and in opposition to this request together with argument by counsel,
the Board rules that the application of Rodeo® as provided in the shoreline permits is
subject to the stay provisions of the SMA. The word "construction" in RCW
90 58 140(5) may not be narrowly construed to defeat the intent of the SMA stay
provision. The intent is to preserve the status quo pending review. The appellants have
raised genuine concerns regarding use of glyphosate to control spartina. They are entitled
to present their case as to the adverse effects of glyphosate before the use of the product is
implemented. It appears, however, that the appellants do not take issue with any of the
mechanical management methods identified in the Willapa Bay Regional Plan. There is
no reason for those activities to be subject to the stay. It shall be accordingly ordered that
the stay will remain in effect, but only as to the use of glyphosate.

VIII

Any finding of fact deemed to be a conclusion of law is hereby adopted as such.

Based on the foregoing findings of fact and conclusions of law, the Board enters
the following

ORDER


IT IS HEREBY ORDERED that the motions for summary judgment are
DENIED, and

IT IS FURTHER ORDERED that the use of Rodeo® as authorized under
shoreline permits granted to the Department of Natural Resources and Department of Fish
and Wildlife is subject to the stay provisions of RCW 90 58 140(5). The mechanical
methods for control identified in the Willapa Bay Regional Plan shall not be subject to
the stay.

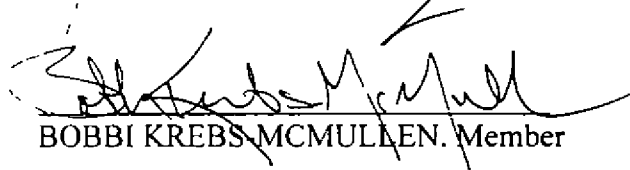
DONE this 14th day of November, 1994

SHORELINES HEARINGS BOARD


JAMES A. TUPPER, JR. Presiding


ROBERT V. JENSEN, Chairman


RICHARD C. KELLEY, Member


BOBBI KREBS-MCMULLEN, Member


TRACI GOODWIN, Member


JIM LYNCH, Member

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